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March 14, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: August 29, 2007
Case Number: TSO-0539

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter "the Individual") for access authorization. This decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's application for access authorization should be granted. For the reasons detailed below, it is my decision that the Individual's access authorization request should be denied.

I. APPLICABLE REGULATIONS

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." Under Part 710, the Department of Energy (DOE) may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual's eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." *See* 10 C.F.R. § 710.27(a). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a).

II. BACKGROUND

The Individual is an employee at a DOE facility. In February 2004, her supervisor requested that the Individual be granted a security clearance. As part of the Local Security Office's (LSO) investigation, the Individual completed and submitted Questionnaires for National Security Position (QNSP) in January 2004, March 2005, September 2005 and January 2006. In addition, the LSO conducted Personnel Security Interviews (PSIs) with the Individual in March 2005 and

March 2007. The LSO discovered that the Individual had been a user of crack cocaine, while a federal employee, and had been arrested in April 1998 for Possession of a Narcotic Controlled Substance (crack cocaine).¹ The LSO also discovered that the Individual, in lieu of adjudication of this arrest, had entered into a court-sponsored drug diversion and treatment program. In reviewing the evidence collected in its investigation, the LSO found that the Individual had failed to disclose in various QNSPs that she had been arrested for a drug related offense or that she had received treatment for a mental health problem. The LSO also found that the Individual, in her PSIs, had been less than truthful concerning the extent of her cocaine use.

In July 2007, the LSO informed the Individual in a Notification Letter that her prior illegal drug use and her failure to be candid in her QNSPs and her PSIs concerning her illegal drug use, arrest and participation in a drug diversion and treatment program in the QNSPs, constituted derogatory information that created a substantial doubt as to her eligibility for an access authorization under 10 C.F.R. § 710.8(f) and (k) (Criterion F and Criterion K, respectively). Additionally, her admission that she purchased crack cocaine as a federal employee and her failure to provide accurate answers after signing Security Acknowledgement forms on January 12, 2004 and September 19, 2005, constituted derogatory information that created a substantial doubt as to her eligibility for an access authorization under 10 C.F.R. § 710.8(l) (Criterion L).² July 2007 Letter from Manager, Personnel Security Division, to Individual (Notification Letter).

A hearing was held in this matter. At the hearing, DOE did not present witnesses. The Individual offered her own testimony, as well as that of her current spouse and two co-workers. The DOE submitted 18 exhibits (Exs. 1-18) for the record. The Individual submitted three exhibits (Ind. Exs. A-C).

III. FACTUAL FINDINGS

The facts in this case are essentially not in dispute. A brief summary is provided below.

The Individual has been employed by the Department of Energy since August 1987 as a procurement technician. In 1996, the Individual began to use crack cocaine with her then-husband. Ex. 17 at 38, 66. During the time the Individual was using cocaine, she would typically be provided cocaine by others or she would provide money for its purchase by others. Ex. 17 at 39-40. During 1996, the Individual was using cocaine every day. Ex. 16 at 53. In 1997, her use of cocaine had fallen to once or twice a month. Ex. 16 at 56. The Individual, however, in April 1998, was observed by a police officer while attempting to purchase crack cocaine and was

¹ “Crack” cocaine is the free base form of cocaine.

² Criterion F refers to derogatory information that indicates that an individual “deliberately misrepresented, falsified, or omitted significant information from . . . a Questionnaire for Sensitive (or National Security) Positions, [or] . . . a personnel security interview, . . . made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization.” 10 C.F.R. § 710.8(f). Criterion K refers to information indicating that an individual has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances . . . (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.).” 10 C.F.R. § 710.8(k). Criterion L references information indicating that an individual is “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy. . . .” 10 C.F.R. § 710.8(l).

arrested and ultimately charged with Possession of a Narcotic Controlled Substance. Ex. 16 at 50; Ex. 18 at 33. In adjudicating her case, the local court gave the Individual the opportunity to enter a state drug diversion treatment program whereby, if the Individual successfully completed the program, the charges would be dropped and all records pertaining to the arrest would be sealed. Ind. Exs. A, B. The diversion program consisted of individual and group counseling as well as educational classes. Ex. 16 at 92. During this program the Individual attended approximately 150 meetings and classes. Hearing Transcript (Tr.) at 87-88. The Individual successfully completed this program and the criminal possession charge was dismissed in December 1998. Ind. Ex. C. In June 2000, the Individual divorced her husband. Ex. 13 at 5.

The DOE Field Office where she had been employed closed, and the Individual transferred to her current position at another DOE Office in 2004. Ex. 12 at 3. Her new supervisor requested that the Individual be granted a security clearance. As part of the process to investigate the Individual's fitness for a security clearance, the Individual signed a Security Acknowledgement Form on January 12, 2004, certifying her knowledge that deliberately misrepresenting, falsifying or omitting significant information from a QNSP could result in the loss of access authorization. Ex. 11. The Individual subsequently completed a QNSP in January 2004 (1/04 QNSP). Ex. 15. In this QNSP, the Individual answered "No" to Question 21 which asked if she had ever received treatment for a mental health related condition, and to Question 23, which asked whether the Individual had ever been charged with an offense related to alcohol or drugs. Ex. 15 at 7. In this QNSP, the Individual answered "No" when asked in Question 24 whether in the past seven years she had ever used an illegal drug or had purchased an illegal drug. Ex. 15 at 8.

The Individual was asked to complete another QNSP in March 2005 (3/05 QNSP). In this QNSP, she again answered "No" to Questions 21, 23 and 24 asking about mental health treatment, drug related arrests and use or purchase of illegal drugs. Ex. 14 at 7-8. After completing the 3/05 QNSP, the LSO conducted a Personnel Security Interview (3/05 PSI) with the Individual. Ex. 17. In the PSI, the Individual admitted to using crack cocaine in 1996 and 1997 with periods of daily use. Ex. 17 at 36. The Individual also admitted to being arrested while trying to purchase crack cocaine in 1998. Ex. 17 at 20, 43. The Individual stated that, as part of the adjudication of her arrest, she agreed to participate in a court-sponsored drug diversion program. Ex. 17 at 27-28. The Individual also stated that she told her supervisor at her previous DOE Field Office after the arrest that she had a problem with cocaine and she was referred to a separate counseling program. Ex. 17 at 28, 43.

In September 2005, the Individual completed another Security Acknowledgment Form and another QNSP (9/05 QNSP). In this QNSP, the Individual again answered "No" to Question 21 regarding whether she had received treatment for a mental health condition in the past seven years. Ex. 13 at 7. The Individual responded "Yes" to Question 23 asking about drug related arrests and reported her 1998 arrest (although she reported the arrest as occurring in 1997). Ex. 13 at 7. The Individual also answered "Yes" to Question 24a regarding whether she had illegally used a controlled substance and reported that she had used cocaine "once." Ex. 13 at 8.

The Individual completed another QNSP in January 2006 (1/06 QNSP). The Individual again answered "No" when asked in Question 21 whether in the past seven years she had received treatment for a mental health condition. Ex. 12 at 7. With regard to Question 23d, the Individual

answered “No” when asked about ever having a drug-related arrest. The appearance of the form indicates that the Individual originally had answered “Yes” to this question and attempted to give additional information as to the arrest but later changed the answer to “No” and deleted the additional information. Ex. 12 at 7. As in the 9/05 QNSP, the Individual also answered “Yes” to Question 24a regarding whether she had illegally used a controlled substance and reported that she had used cocaine “once.” Ex. 12 at 8.

In March 2007, the LSO conducted another PSI with the Individual (3/07 PSI). The Individual confirmed the details she had provided in her 3/05 PSI about her prior cocaine use and her arrest. Ex. 16. During this PSI, the Individual, when asked why she had admitted to only a one-time use of cocaine in her 9/05 QNSP and 1/06 QNSP stated that she was afraid of the effect that a full admission of the extent of her cocaine use would have on her job and the request for her security clearance. Ex. 16 at 104.

IV. ANALYSIS

The concerns raised by the Criterion K derogatory information regarding the Individual’s use and purchase of cocaine are well substantiated in the record and consequently the LSO had more than sufficient evidence to support invoking this Criterion. Likewise, the Individual’s admitted purchase of cocaine while a federal employee, and her signing two Security Acknowledgment Forms and yet failing to provide complete and accurate information on various QNSPs, are sufficiently documented to support the LSO invoking Criteria F and L in its Notification Letter.³ The Individual seeks to resolve and mitigate the security concerns this evidence has raised by establishing that (1) she has not used cocaine or any other type of illegal drug since 1998 and (2) her failure to report her arrest for possession was prompted by her belief that, by successfully completing the state drug diversion program, the records regarding the arrest would be sealed pursuant to state law and thus she had no duty to report such an arrest on her QNSPs. I will first consider the Criterion K concerns.

A. Criterion K

As mentioned above, the Criterion K concerns arise from the Individual’s past use of cocaine. At the hearing, the Individual testified regarding the circumstances of her arrest while trying to purchase crack cocaine in 1998. Tr. at 47-48. She believed that her use of cocaine was influenced by the fact that her first husband was also using cocaine. Tr. at 68. Because her use of drugs was related to her relationship with her first husband, she believed that she needed to

³ Pursuant to Criterion F, the Notification Letter charges that the Individual failed to report on various QNSPs that she had received mental health treatment (i.e., that she had entered in the drug diversion program). Specifically, Question 21 on the QNSPs asks, “In the last 7 years have you ever consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health condition?” The only evidence in the record indicates that in the drug diversion program the individual was required to attend Alcoholics Anonymous or Narcotics Anonymous meetings as well as educational meetings about illegal drug use. Tr. at 86-87. There is no evidence that she consulted a “professional” as defined in Question 21 (a psychiatrist, psychologist or counselor) regarding treatment for her illegal drug use and thus no indication that the Individual deliberately falsified her response to the question. Consequently, I find that there is no basis for citing this information as a security concern.

separate from him to rehabilitate herself. Tr. at 68. Both agreed to separate and divorce in 2000. Tr. at 68. Her incarceration at a local jail after the arrest was a wake-up call to which, in response, she resolved never to do anything that could result in her going back to jail. Tr. at 66-67. She has not used cocaine or any other illegal drug since her arrest in 1998. She no longer associates with anyone who uses illegal drugs. Tr. at 68.

She accepted the offer of a state drug diversion program in lieu of adjudication of her arrest for possession. The program involved daily drug testing and mandatory attendance at educational and group meetings such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. Tr. 86-87. During the period of the program the Individual attended approximately 150 meetings. Tr. at 88. Upon successful completion of the program the Individual was required to appear in court and address a group of people who were ready to enter the drug diversion program she had just completed. Tr. at 51; Ind. Ex. A. at 4 (documenting completion of drug diversion program).

The Individual does not now attend any treatment or rehabilitation meetings. Tr. at 83. However, she testified that one of her main support systems was her attendance and involvement with a church. Tr. at 83. She no longer has any cravings to use cocaine. Tr. at 85. In retrospect, she now recognizes that her decision to use cocaine was a bad decision that has caused her to struggle to reestablish her self-esteem and finances. Tr. at 86.

The Individual's current spouse testified concerning the Individual's involvement at their church. He believes that the Individual has changed the way she looks at issues in life and that now she is able to have faith and to "trust in good." Tr. at 45. He also believes that the Individual's family, though geographically distant, provides her with much support. Tr. at 41. He testified as to the Individual's increased efforts and interests in career advancement at DOE. Tr. at 41-42. Given the changes in her personality, he believes that it is unlikely that the Individual would ever again use illegal drugs. Tr. at 46.

One of the Individual's coworkers, who has known the Individual since 1981, testified that she currently socializes outside of work with the Individual approximately once a month. Tr. at 13. Both transferred to their current DOE facility in 2004. Tr. at 14. Since their transfer approximately four years ago, the coworker has never observed the Individual using illegal drugs. Tr. at 19.

Given the evidence before me, I find that the Individual has resolved the Criterion K concern raised by her past drug use. The Individual has completed a drug diversion program that required daily testing as well as extensive educational meetings. The Individual has also changed her life and, with her new employment at her current DOE facility, has physically separated herself from her acquaintances who used drugs. Her husband, church and family provide a support system that will discourage her from ever using illegal drugs again. Lastly, a significant period of time, over nine years, has passed since her last illegal drug usage. *See* Tr. 78-79 (no information indicating that Individual has used illegal drugs since arrest in 1998). For the foregoing reasons, I believe that the risk that the Individual will again use illegal drugs is low. Consequently, I find that the Individual has resolved the Criterion K security concern.

B. Criterion F

The security concern regarding the Criterion F derogatory information arises from the Individual's failure to accurately report in the various QNSPs her arrest for cocaine possession and the extent of her usage. The Individual has presented information to mitigate the concerns. She has provided testimony from witnesses attesting to her honesty. It is apparent from the testimony that the Individual is a different person from the person she was in the late 1990s, and has made many significant changes in her life.

Nevertheless, the falsifications are serious and fairly recent events, which outweigh this testimony. The Individual's primary assertion to mitigate the security concerns raised by her omissions is her belief that all facts regarding the arrest would be sealed pursuant to state law. The Individual directed my attention to the state criminal law statute that provides for the sealing of records pursuant to successful completion of a drug diversion program. I have reviewed this provision of the state's law and find that her assertion is correct. *See* Ind. Ex. A, B and C. She has also submitted evidence from state court indicating that she has completed the mandatory drug diversion program and that the court has formally sealed the records relating to her arrest.⁴ However, as explained below, after reviewing the facts I do not believe that the security concern regarding the Individual's lack of candor have been mitigated.

The Individual answered "No" when asked if in the past seven years she had ever illegally used a controlled substance such as cocaine on her 1/04 and 3/05 QNSPs. On her 9/05 and 1/06 QNSPs she answered the same question by responding that she had used cocaine only once. The Individual testified that she did not answer the question regarding the extent of her drug use because her arrest records were sealed and that consequently "I didn't have to acknowledge those whole dark years of my life." Tr. at 70. However, given the wording of the question, I am not persuaded that the Individual believed that the sealing of her arrest record would excuse her from fully answering a question about her past drug use. More importantly, at the hearing the Individual admitted under questioning by the DOE Counsel that her answering "once" was an attempt to hide the extent of her drug use for fear that it would affect her ability to receive a clearance:

Q. So even though you disclosed it, you put the number of times that you used it as one time, but we know that you didn't use [cocaine] just one time.

A. Well, probably not. It was several times.

Q. So why did you put just once there?

A. Trying to protect myself.

Q. Okay.

⁴ The Individual did not realize until recently that she needed to make an application to the court after completion of the diversion program to have the arrest record sealed.

Q. Did you realize that -- or did you think that if you had put extensive drug use on here that you might not get a clearance, is that what you mean by "protecting yourself"?

A. Probably so.

Tr. at 71. This testimony is consistent with her response in the 3/07 PSI, where she acknowledged that she minimized the amount of illegal drug use in her QNSP because she was afraid that she could lose her job and not receive a clearance. Ex. 16 at 104.

With respect to her failure to accurately answer Question 23 regarding whether she had ever been arrested for offenses related to drugs, I cannot find that the Individual's belief that she need not answer the question accurately because her records were sealed resolves the concern. Question 23 instructions contain the following language "[f]or this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record." *See, e.g.*, Ex. 14 at 7. When asked about this instruction, the Individual responded that she did not remember reading the instruction or that she just answered the question without reading the instruction. Tr. at 58. The Individual also testified at the hearing that in preparing the 1/06 QNSP a person from the LSO advised her to change the answer from "Yes" to "No," with words to the effect that "If they can't find anything, don't say nothing." Tr. at 60-61.

None of these excuses is satisfactory. I believe the Individual has a problem with fully and accurately revealing the facts surrounding the difficult period of her life while she was using cocaine. However, the DOE security process requires unflinching candor from those who seek a clearance. Given the specific instructions on the QNSP and the Individual's admitted lack of candor regarding the extent of her cocaine use, I cannot find that the Individual has mitigated the Criterion F concern raised by the misleading answers provided in the QNSPs.

C. Criterion L

The Criterion L derogatory information centers on the fact that the Individual was a federal employee while she was using cocaine and when she attempted to purchase cocaine. Additionally cited as Criterion L derogatory information was the fact that the Individual signed two Security Acknowledgment forms certifying that she understood that failure to provide accurate answers in a QNSP could be grounds for her application for a security clearance to be denied and yet she still provided misleading answers on her QNSPs.

These undisputed facts clearly point to an individual's potential unreliability. On one hand, the use and purchase of cocaine happened almost a decade ago. As discussed in the Criterion K section, the Individual's completed drug diversion program, changed life style and the passage of time mitigate the security concern arising from this conduct. However, as discussed above, I find that there is still a concern with the Individual's candor and, as such, I cannot find that the Criterion L information has been resolved.

V. CONCLUSION

As explained above, I find that the security concerns under Criterion K related to the Individual's use and purchase of crack cocaine have been resolved. However, I find that the security concerns under Criteria F and L relating to the Individual's failure to provide accurate information on various QNSPs have not been resolved. I cannot conclude that granting the Individual an access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Consequently, the Individual's access authorization application should be denied. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: March 14, 2008